

1989

# Olympus Hills Shopping Center, Ltd. v. Wasatch Bowling, Inc. : Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. 89-0598

IN THE COURT OF APPEALS  
FOR THE STATE OF UTAH

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OLYMPUS HILLS SHOPPING CENTER,	:	BRIEF OF RESPONDENT
LTD., a Utah limited partner-	:	
ship,	:	
	:	
Plaintiff/Respondent,	:	
	:	
v.	:	
	:	
WASATCH BOWLING, INC., a Utah	:	Docket No. 890598-CA
corporation,	:	District No. C87-8427
	:	Priority No. 14b
Defendant/Appellant.	:	

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\* \* \* \*

APPEAL FROM THE RULING OF THE THIRD JUDICIAL DISTRICT COURT,  
SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE HOMER F. WILKINSON PRESIDING  
POURED OVER FROM UTAH SUPREME COURT (#890343)

\* \* \* \*

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DEPOSITED BY THE  
STATE OF UTAH  
AUG 20 1990

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IN THE COURT OF APPEALS  
FOR THE STATE OF UTAH

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### JURISDICTION

This court has jurisdiction over this action pursuant to Utah Code Ann. Section 78-2a-3(2)(j).

This is an appeal from a final partial summary judgment of the Third District Court evicting defendant/appellant (hereinafter referred to as "Wasatch") from leased premises.

### STATEMENT OF ISSUES ON APPEAL

Plaintiff/respondent ("Olympus") objects to Wasatch's statement of issues on appeal for the reasons stated more fully below. Many of the issues presented by Wasatch are not properly before this court. The only issues on appeal are (1) whether Judge Wilkinson properly granted Olympus's motion for partial summary judgment (2) properly found that there was no just reason for delay and (3) properly certified that judgment as a final judgment.

### DETERMINATIVE LAW

Rule 54(b) of the Utah Rules of Civil Procedure, which Olympus believes to be determinative, is copied and attached hereto as Exhibit "A".

### STATEMENT OF THE CASE

#### NATURE OF THE CASE

This is an appeal from a partial summary judgment evicting Wasatch from leased premises.

### COURSE OF PROCEEDINGS

On or about September 10, 1984, Olympus and Wasatch entered into a written lease agreement (R. 6-48) under which Wasatch agreed to lease from Olympus certain real property in the Olympus Hills Shopping Center located at 4015 South Wasatch Boulevard, Salt Lake City, Utah. Wasatch failed to make lease payments under the lease, and on or about October 12, 1987, Wasatch executed a promissory note agreement in the amount of \$67,197.68, which amount constituted the delinquent amount due under said lease. R. 194-196. A copy of said promissory note is attached hereto as Exhibit "B".

On or about December 22, 1987, Wasatch was again delinquent and Olympus filed an unlawful detainer action (original complaint in this action). R. 2-49. Wasatch answered the complaint and settlement negotiations followed. On June 20, 1988, the parties executed a letter agreement (Exhibit "C"). The validity of the letter agreement is questionable since the parties were never able to agree whether the percentage rent in paragraph 1 was monthly or annual. The agreement shows the word being changed several times, but no final agreement was reached as to that wording.

Regardless of the wording, the terms of the letter agreement were never followed by Wasatch. Thus, Olympus moved to



amend its complaint (R. 87-92) and the court granted Olympus's motion to amend on January 6, 1989. R. 95-96. On or about January 29, 1989, Olympus moved for partial summary judgment to evict Wasatch. R. 104-112. Olympus's motion was supported by an affidavit stating that Wasatch was in default in payments due under the lease agreement in the amount of \$140,000.00. R. 110-112 and Exhibit "G". Wasatch filed no opposing affidavit, and opposed the motion on legal grounds only. R. 113-117.

On April 28, 1989, the court granted Olympus's motion to evict. R. 151-152. On June 1, 1989, a Writ of Restitution was executed and Wasatch was thereafter removed from the subject premises. R. 184-185, 188. On June 7, 1989, the parties appeared before Judge Daniels (due to Judge Wilkinson's absence) regarding the question of whether Wasatch's bond would retroactively stay execution of the already executed writ of restitution. Judge Daniels made an order, which was signed on June 15, 1989, wherein he ruled that, for the convenience of the parties, pending Judge Wilkinson's return, Wasatch would be allowed to return to the premises but without prejudice to Olympus's execution of the writ of restitution. R. 205-208.

Upon Judge Wilkinson's return, at least two hearings were held regarding the sufficiency of Wasatch's supersedeas bond. Wasatch never did comply with Judge Wilkinson's orders regarding

the supersedeas bond. Judge Wilkinson had given defendant until June 27, 1989 to comply with the court's orders regarding the supersedeas bond. Rather than filing the bond, Wasatch filed bankruptcy on June 27, 1989. R. 258. However, on June 28, 1989, Judge Clark entered an order lifting the stay. R. 253-254 and Exhibit "D". A second writ of restitution was executed June 29, 1989, and Wasatch was removed from the subject premises a second time. R. 251-252.

On July 3, 1989, the bankruptcy stay was reinstated nunc pro tunc by Judge Boulden and Wasatch was once again allowed to return to the premises. On August 8, 1989, the stay was again lifted by Judge Clark (Exhibit "E") and a third writ of restitution was executed on August 8, 1989 (R. 271-275), removing Wasatch from the premises. On August 16, 1989, Wasatch's bankruptcy was dismissed. Exhibit "F".

#### DISPOSITION BELOW

On April 28, 1989, Judge Wilkinson entered an order of partial summary judgment evicting Wasatch from its leased premises based upon its default under the lease agreement. Judge Wilkinson reserved for a later ruling the question of the amount of the default. However, Judge Wilkinson found that there was no just reason for delay of execution of the eviction order and directed a final judgment.

#### RELEVANT FACTS WITH CITATIONS TO THE RECORD

The only facts upon which Judge Wilkinson based his ruling are found in the Affidavit of Lauren B. Hunt. Wasatch never did file a counteraffidavit contesting any of the facts set forth in the Affidavit of Lauren B. Hunt. A copy of Ms. Hunt's affidavit is attached hereto as Exhibit "G" for the court's convenience. The sworn testimony is that, as of January 1, 1988, Wasatch was substantially past due in rental payments due under the lease agreement, the payments were never brought current, and the default amount totals, as of January 20, 1989, \$147,250.79.

#### SUMMARY OF ARGUMENT

Wasatch has no basis whatsoever for this appeal. First of all, this is not an unlawful detainer action, but is an action for breach of lease agreement, requesting eviction, past due rent and attorney's fees. The complaint was amended and the original unlawful detainer complaint is not an issue.

Second, the issue of eviction and the amount of the default are distinct and separable requests for relief. Because Wasatch has admitted through all stages of this action that it was in substantial default, there was no just reason to delay the eviction pending the determination of the amount due.

Finally, the court below never approved Wasatch's supersedeas bond because it was an insufficient surety. Therefore, there never was a stay of the execution of the judgment.

#### ARGUMENT

##### I. THE TRIAL COURT PROPERLY GRANTED OLYMPUS'S MOTION TO AMEND COMPLAINT.

On or about December 22, 1987, Olympus filed its complaint against Wasatch for unlawful detainer, alleging default of payment of rent and seeking to evict Wasatch. For the next several months, the parties attempted to negotiate a settlement which culminated in the letter agreement of June 20, 1988, which was signed July 13, 1988. However, that agreement was never properly executed since the parties could not agree as to whether the percentage rent in paragraph 1 was annual or monthly.

At any rate, even if the agreement was properly executed, it was immediately breached by Wasatch. Therefore, as of December 20, 1988, Wasatch was in substantial breach of the original lease, with or without the amendment. On that date, Olympus filed its motion to amend complaint.

The amended complaint sought the same remedy as the original complaint ---- eviction of Wasatch based upon a default in the payment of rent. The amended complaint brought the letter

agreement into issue and sought eviction on the basis of breach of lease rather than unlawful detainer.

Amending the complaint was the obvious and proper procedure for Olympus to follow. All of the issues raised in the original complaint were as yet unresolved, namely, eviction, amount of rent due, and payment of penalties, costs and attorney's fees. When the parties could not reach a settlement and when Wasatch continued to fail to make the payments due, then Olympus had to again seek its remedy. A new action would have been improper since Olympus was seeking the same relief as in the original action.

At any rate, the court's order allowing Olympus to amend its complaint certainly caused no prejudice to Wasatch in that no trial date had ever been scheduled. The motion was timely for the same reason and due to the fact that the parties had in good faith attempted to negotiate a settlement during the one year period that the case was pending before the amendment. Therefore, under the recent Court of Appeals case of Regional Sales Agency, Inc. v. Reichert, 122 Utah Adv.Rep. 46, 50 (Ct.App. 11-24-89), all of the factors for the granting of a motion to amend were met.

Many of the arguments in Wasatch's brief focus on the fact that the original complaint was an unlawful detainer complaint. However, it is very clear under Utah law that the original complaint is no longer an issue in this case for any

purpose. In the case of Teamsters, Chauffers, Warehousemen and Helpers, Local Union 222 v. Motor Cargo, 530 P.2d 807 (Utah 1974) the court stated:

The law is overwhelming to the effect that when an amended complaint, complete in and of itself, is filed, the former complaint is functus officio and cannot be used for any purpose.

Id. at 808.

In this case, an amended complaint was filed and was complete in and of itself. Therefore, the original complaint "cannot be used for any purpose."

Furthermore, in the case of Munden v. Hazelrigg, 105 Wash.2d. 39, 711 P.2d 295 (1985), the Supreme Court of Washington held that a complaint originally filed as an unlawful detainer action could be converted to an ordinary civil action. The court stated:

Additionally, conversion of an unlawful detainer action to a civil suit spares the expense and inconvenience to all parties of maintaining two suits. . .

We also note that the trial court has inherent power to fashion the method by which an unlawful detainer action is converted to an ordinary civil action. The court may require amended pleadings to convert the unlawful detainer to a civil suit.

Id. at 299.

Likewise in the case of Thomson v. Reynolds, 174 P. 164 (Utah 1918), the Utah Supreme Court directed that an unlawful detainer action be remanded and that the District Court permit the parties to amend and recast their pleadings. Id. at 167.

Therefore, Olympus's original complaint was properly amended to a civil action.

II. THE TRIAL COURT PROPERLY AWARDED PARTIAL SUMMARY JUDGMENT FOR EVICTION.

Olympus has already discussed above the issue of the letter agreement. Whether or not it was properly executed, both it and the original lease agreement were in default at all times relevant to this proceeding. Furthermore, whether or not the letter agreement was properly executed, all of the provisions of the main lease agreement continued in effect except those specifically changed in the letter agreement. Contrary to the allegations of Wasatch in its brief, the letter agreement does not state that there is no forfeiture clause. The letter agreement merely states that the reduced payments will continue for two years, at the end of which time the regular lease payments will resume.

Section 24.01 of the lease agreement provides:

In the event of any failure of tenant to pay any rental due hereunder within ten (10) days after the same shall be due, . . . then owner besides other rights and remedies it may have,

shall have the immediate right of re-entry and may remove all persons and property from the leased premises and such property may be removed and stored in a public warehouse at the cost of, and for the account of tenant, all without service of notice or resort to legal process and without being guilty of trespass or becoming liable for any loss or damage which may be occasioned thereby.

Section 24.02 provides:

Should owner elect to re-enter, as herein provided, or should it take possession pursuant to legal proceedings or pursuant to any notice provided for by law, it may either terminate this lease or it may from time to time without terminating this lease . . . relet said premises . . .

In response to Olympus's motion for summary judgment, Judge Wilkinson terminated the lease and ordered a writ of restitution, restoring Olympus to possession of the leased premises and evicting Wasatch. In addition, Judge Clark has found in a final order, from which no appeal was ever taken, that the lease was forfeited. See Exhibit "E".

Therefore, Wasatch's several claims that there was no forfeiture provision or any other remedy available to Olympus Hills for restitution of the premises fails. Judge Wilkinson properly evicted Wasatch for failure to pay rent.



III. WASATCH'S ALLEGATION THAT RENT PAYMENTS FOR APRIL AND MAY OF 1989 WERE MADE IS NOT PROPERLY BEFORE THIS COURT; AT ANY RATE, OLYMPUS DENIES THAT SUCH PAYMENTS WERE MADE.

Wasatch alleges in Section 7 of its brief that Olympus accepted rent and waived its right to restitution. These factual allegations are not in the record before this court and were never made a part of the ruling below from which the appeal was taken.

Furthermore, Olympus denies having ever received payment of rent for April and May of 1989. Wasatch did promise that it would bring all rent payments current soon after the court's order in April of 1989. Wasatch occasionally made payments toward old obligations to Olympus. However, Wasatch never became current in its lease payments. Although Wasatch makes that allegation in its brief, it was never made in the court below and is not properly before this court.

IV. THE ORDER OF THE TRIAL COURT WAS PROPERLY CERTIFIED AS A FINAL ORDER.

Wasatch contends that the trial court improperly certified the partial summary judgment motion for eviction as a final judgment. Rule 54(b) of the Utah Rules of Civil Procedure provides that the court may direct entry of a final judgment as to fewer than all the claims "where more than one claim for relief is presented in an action . . ." Rule 54(b). In this case, there are

three claims for relief. The prayer in Olympus's amended complaint reads:

Wherefore, plaintiff demands judgment against defendant as follows:

1. For the issuance of a writ of restitution to restore possession of the premises to the plaintiff and to evict the defendant.

2. For past due rent and other charges accruing under the lease as amended in the total amount of \$140,990.54.

3. For reasonable attorney's fees.

4. For such other damages as may be allowed under the lease agreement as amended or under law as may be more specifically proved at the time of trial hereon or at a later date.

5. For costs of suit incurred herein, interest and such other further relief as the court may deem proper.

Therefore, this is clearly a case "where more than one claim for relief is presented in an action".

The court may direct the entry of a final judgment as to fewer than all the claims when it expressly determines that "there is no just reason for delay." Rule 54(b). The court made that express determination in this case, obviously for several reasons. Wasatch did not dispute that it was in substantial default. There was no reason to allow Wasatch to remain on the premises, essentially rent free, while Wasatch forced the parties to go to trial over the issues of the amount due, when payments were made, whether payments were intended to be applied to the promissory note

or to the lease, whether bad checks had been paid back, etc. All of those issues were reserved for a later trial.

In the meantime, Wasatch offered no reason whatsoever why there was a just reason for delay. Even on appeal, Wasatch has offered no just reason why Olympus should have been forced to have Wasatch occupy the premises rent free, after a finding by the court that Wasatch was in substantial default. No finding at trial over the amount due ever could have had an impact on the distinct and separate finding by the court that Olympus was entitled to recover possession. That was a distinct, separate claim for relief.

In the case of Pate v. Marathon Steel Company, 692 P.2d 765 (Utah 1984), the Utah Supreme Court quoted from the United States Supreme Court as follows:

But the District Court may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. [Emphasis in original].

Id. at 768.

Furthermore, in the case of Allen Steel Company v. Crossroads Plaza Associates, 119 Utah Adv.Rep. 6 (Sup.Ct. 10-6-89), the Utah Supreme Court held that a claim for attorney's fees is uniquely separable from the cause of action to be proved at

trial and that a final judgment can be awarded, with the question of the attorney's fees award reserved for a later hearing. Id. at 9-10.

Therefore, the trial court, in its discretion, properly certified the judgment as to possession as a final judgment, subject to immediate execution, since there was no just reason for delay of execution of that judgment. If this court determines that, due to the remaining claims for rent and attorneys fees, the eviction judgment was not a final judgment for the purpose of executing the judgment, Olympus is willing to waive its claim to the rent due. That would necessarily result in a final judgment. However, Olympus will not waive that claim under any other circumstances.

V. WASATCH FAILED TO POST A SUFFICIENT SUPERSEDEAS BOND.

In at least two hearings, Wasatch failed to satisfy the court's order regarding the posting of a supersedeas bond. Rule 62(d) of the Utah Rules of Civil Procedure provides that an appellant may file a supersedeas bond to obtain a stay. However, that rule further provides: "The stay is effective when the supersedeas bond is approved by the court."

In this case, the court never did approve the sufficiency of the proposed bond. When Wasatch proposed to pledge the assets of its sister company, Rancho Lanes, as security for Olympus's

judgment in this action, and when Olympus objected to that bond under Rule 62(i) as simply posting one financially troubled bowling alley for another, both Judge Daniels and Judge Wilkinson required a second surety in order to offer sufficient protection to Olympus. Wasatch failed to ever post a second sufficient surety. The trial court gave Wasatch more than sufficient time and opportunity to post such a bond, but Wasatch was either unable or unwilling to do so.

Therefore, the trial court properly ruled that there was not sufficient surety for a supersedeas bond.

VI. THE ISSUES RAISED IN WASATCH'S APPEAL HAVE BECOME MOOT; THE LEASE HAS ALREADY BEEN DECLARED TERMINATED.

On August 8, 1989, Judge Glen E. Clark of the United States Bankruptcy Court for the District of Utah entered an order granting Olympus relief from the automatic stay, allowing Olympus to pursue its state law remedies with respect to the premises which are the subject matter of this action. In that order, the court found:

The prepetition eviction of the debtor [Wasatch] pursuant to the Writ of Restitution terminated the lease, leaving nothing for the debtor to assume or assign on the petition date.

Wasatch never appealed this order of the Bankruptcy Court finding a termination of the lease agreement. Therefore, Wasatch cannot now dispute the fact that the lease has been terminated.

Accordingly, Wasatch has no rights whatsoever in the subject premises. Even if the court were to reverse the decision of the trial court, Wasatch would be unable to return to possession of the premises, it having no interest in the premises. Further, once Judge Clark determined that the lease had been terminated, Olympus leased the premises to a new tenant, who now has possession of the premises under a new leasehold agreement.

VII. OLYMPUS IS ENTITLED TO ITS ATTORNEY'S FEES INCURRED IN THIS APPEAL.

Pursuant to Rules 33(a) and 40(a) of the Rules of this court, and under the case of O'Brien v. Rush, 744 P.2d 306 (Utah Ct.App. 1987), attorney's fees can be awarded if an appeal has no basis in law or fact. In this case, the lease has been forfeited, and Wasatch has admitted from the very beginning that it was in substantial default under the lease agreement. Pursuant to the terms of the lease agreement, Olympus is entitled to recover possession of the premises upon Wasatch's default. Having admitted being in default under the terms of the lease, Wasatch has no position to complain about being evicted, either in the trial court or on appeal. This appeal has no valid basis in law or in fact, and is brought solely for the purpose of harassing Olympus.

This appeal culminates Wasatch's long series of delay tactics, made up of breached agreements, an overdue promissory

note, bad checks, frivolous opposition to Olympus's eviction action, improper supersedeas bonds and an eleventh hour bankruptcy. All of these tactics forced Olympus to evict Wasatch three separate times. These circumstances, followed by this meritless appeal, certainly entitle Olympus to an award of its attorneys fees. The history of the case is similar to Porco v. Porco, 752 P.2d 365 (Utah Ct. App. 1988), where fees were awarded as a result of successive petitions to modify the divorce decree.

Therefore, Olympus is entitled to recover its attorney's fees incurred in defending this appeal.

CONCLUSION

Therefore, the judgment of the trial court should be affirmed and Olympus should be awarded its attorney's fees incurred in responding to this appeal.

DATED this 17 day of January, 1990.


KESLER & RUST

By Scott Mercer  
SCOTT O. MERCER  
Attorneys for Plaintiff/Respondent

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed <sup>four</sup>~~2~~ true and correct copy<sup>ies</sup> of the foregoing BRIEF OF RESPONDENT in Docket No. 890598-CA, postage prepaid, this 17 day of January, 1990, to:

Mitchell R. Barker  
Ronald C. Barker  
Attorneys for Defendant/Appellant.  
2870 South State Street  
Salt Lake City, UT 84115

  
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l:brief.was



## Exhibits

## Exhibit A

limitations as provided in the Utah Rules of Evidence for a court sitting without a jury.

(d) **Proceedings.**

(1) **Meetings.** When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) **Witnesses.** The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) **Statement of accounts.** When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

3) **Report.**

(1) **Contents and filing.** The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) **In non-jury actions.** In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) **In jury actions.** In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues sub-

mitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) **Stipulation as to findings.** The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) **Draft report.** Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) **Objections to appointment of master.** A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

(Amended, effective Jan. 1, 1987.)

## PART VII.

### JUDGMENT.

#### Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for judgment.**

(1) **Generally.** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed

## Exhibit B

## PROMISSORY NOTE AGREEMENT

WHEREAS, on September 10, 1984, Wasatch Bowling, Inc., entered into a certain lease agreement with Olympus Hills Shopping Center, Ltd., owner, under which Wasatch Bowling as tenant, agreed to lease from Olympus Hills Shopping Center, Ltd., approximately 22,000 square feet of real property in the Olympus Hills Shopping Center located at 4015 South Wasatch Boulevard, Salt Lake City, Utah; and

WHEREAS, Wasatch Bowling, Inc., is substantially in default in the payment of payments due, including rent, under the terms and conditions of said lease agreement; and

WHEREAS, Olympus Hills Shopping Center, Ltd., has certain rights and remedies against Wasatch Bowling, including, but not limited to, legal action to evict Wasatch Bowling and/or for all amounts due and all attorney's fees and costs; and

WHEREAS, Wasatch Bowling, Inc. contemplates certain refinancing arrangements for its business operations and agrees and warrants it will use its best efforts and all due diligence to complete such refinancing and upon the successful completion of the same, will immediately pay the obligation represented hereby in full, notwithstanding any other terms and conditions herein; and

WHEREAS, Olympus Hills Shopping Center, Ltd., is willing to forebear its rights to proceed immediately against Wasatch Bowling, Inc., upon certain terms and conditions and if and only if the obligations contained herein are guaranteed personally by Wesley F. Sine;

NOW, THEREFORE, in consideration of such forbearance and other good and valuable consideration receipt of which is hereby acknowledged, Wasatch Bowling, Inc., promises to pay to Olympus Hills Shopping Center, Ltd., at Salt Lake City, Utah, or at such other place as the holder hereof shall designate in writing the sum of Sixty-Nine Thousand Four Hundred and Eighty-Three Dollars and no/100ths (\$69,483.00) in 24 successive monthly installments of \$1,200.00 each due on the same day of each month, commencing October 1, 1987, and continuing for a period of 23 months and one final payment of the full unpaid balance remaining due hereunder, which payment shall be due within thirty days of the due date of the last monthly installment hereinabove set forth.

Wasatch Bowling shall also pay the Olympus Hills Shopping Center, Ltd. with the first installment due October 1, 1987, an additional sum equal to the legal fees and costs incurred by Olympus Hills in the preparation and execution of this Promissory Note Agreement and the Guarantees incident thereto. Olympus Hills shall notify Wasatch Bowling the amount of such additional payment due, at least five (5) days prior to October 1, 1987.

Wasatch Bowling shall provide to Olympus Hills a current financial statement at the time of executing this agreement and at the end of every nine (9) month period in the event payment is not made as agreed or this agreement is extended or renewed.

This obligation shall bear interest at the rate of thirteen percent per annum, 13% ANNUAL PERCENTAGE RATE.

If any installment is not paid in full within ten days after its due date, a late charge may be assessed of \$100.00 dollars, or at holder's election, an amount equal to the annual percentage rate stated above times the unpaid amount of the installment from the due date of the installment until paid in full.

If default be made in payment in whole or in part of any installment at the time when or the place where the same becomes due and payable as aforesaid, and such default is not cured within ten (10) days from the date of written notice of default, then the entire unpaid balance shall, at the election of the holder hereof and without notice of said election, at once become due and payable. In the event of such default or acceleration, the undersigned agrees to pay to the holder hereof reasonable attorneys' fees, legal expenses and lawful collection costs in addition to all other sums due hereunder, whether or not suit is actually filed. Any balance unpaid on maturity of this note shall bear interest thereafter, both before and after judgment, at the annual percentage rate stated above.

Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby waived and the undersigned consents to the release of any security, or any part thereof, with or without substitution.

DATED this <sup>12th</sup> ~~30~~ day of September, 1987.

WASATCH BOWLING, INC.

Attest:

Thomas J. [Signature]  
Corporate Secretary

By: [Signature]

Title:

STATE OF UTAH                    )  
                                          ) ss.  
COUNTY OF SALT LAKE        )

Subscribed and sworn to before me this \_\_\_\_ day of September, 1987.

MY COMMISSION EXPIRES:

\_\_\_\_\_  
NOTARY PUBLIC  
Residing In: \_\_\_\_\_

## GUARANTY AGREEMENT

In consideration and in order to induce Olympus Hills Shopping Center, Ltd., a Utah limited partnership, to accept that certain Promissory Note Agreement dated ~~September 12~~, 1987, entered into by Wasatch Bowling, Inc., a Utah corporation, as a maker, (the "Note") a copy of said Note being attached hereto and made a part hereof, the undersigned Wesley F. Sine, an individual, does hereby unconditionally and absolutely guarantee the full, faithful and prompt performance, payment and discharge by the maker of all of the terms and obligations of said Note in accordance with the terms thereof and, in the event of default by the maker in the payment of any amounts payable under said agreement, the undersigned, upon demand, immediately will pay the total outstanding unpaid principal balance plus any accrued interest and costs due under the terms of said agreement, without requiring any proceedings to be taken by Olympus Hills Shopping Center, Ltd., against the maker.

The liability of the undersigned hereunder shall not be modified in any manner whatsoever by any extension that may be granted to the maker by any court or any proceedings under the Bankruptcy Act, or any amendments thereof, or under any state or federal statute. Undersigned expressly waives the benefits of any such extension. Undersigned agrees to pay all costs of collection including reasonable attorneys' fees, whether or not suit is actually filed.

The undersigned shall provide to Olympus Hills a current financial statement at the time of executing this Guaranty and at the end of every nine (9) month period thereafter, in the event payment is not made as agreed or this Guaranty is extended or renewed.

Undersigned hereby waives notice of the acceptance of this Guaranty and waives presentment, protest and demand and notice of protest and demand of said note. Olympus Hills Shopping Center, Ltd., may without the consent of undersigned and without giving notice hereof to undersigned, compound, compromise and adjust its claim against the maker and grant extensions and other indulgences, to the maker without affecting the obligations of the undersigned hereunder. The obligations of undersigned shall be unconditional and unqualified and shall continue until the said note is fully paid, satisfied and discharged. This Guaranty shall not be discharged or affected by the death of the undersigned, but shall bind his heirs and personal representatives and shall inure to the benefit of the successors and assigns of Olympus Hills Shopping Center, Ltd.

IN WITNESS WHEREOF, undersigned has hereunto set his hand  
this 12<sup>th</sup> day of ~~September~~ <sup>September</sup>, 1987.

Wesley F. Sine  
Wesley F. Sine, an individual

STATE OF UTAH                    )  
                                      ) ss.  
COUNTY OF SALT LAKE        )

Subscribed and sworn to before me this \_\_\_\_ day of September,  
1987.

\_\_\_\_\_  
NOTARY PUBLIC  
Residing In: \_\_\_\_\_

MY COMMISSION EXPIRES:  
\_\_\_\_\_

DE010



## Exhibit C

DEC 20 '88 08:26 CB CRES SLC UT.

P.2

A MEMBER OF THE SEARS FINANCIAL NETWORK



June 20, 1988

COLDWELL BANKER  
COMMERCIAL REAL ESTATE SERVICES,  
a division of Coldwell Banker Commercial Group, Inc.  
FIRST INTERSTATE BUILDING  
170 SOUTH MAIN STREET, SUITE 1200  
SALT LAKE CITY, UTAH 84101-1605

Mr. Wesley Sine  
WASATCH BOWLING  
640 West North Temple  
Salt Lake City, UT 84116

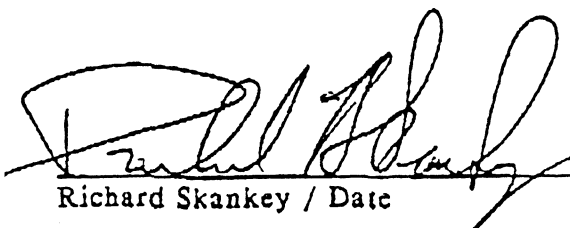
### LETTER OF AGREEMENT

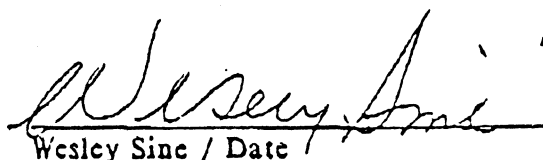
Dear Mr. Sine:

Pursuant to the letter dated 3/31/88 from David R. Kocherhans, Property Manager for Coldwell Banker Real Estate Management Services, pertaining to reduction in rent the following is what Richard Skankey has agreed to:

- 1) Monthly rent shall be reduced to \$4,000.00 versus 10% of the ~~monthly~~ <sup>gross receipts</sup> whichever is greater beginning April 1, 1988. ~~monthly~~ <sup>gross receipts</sup> 246
- 2) Monthly rent shall include all CAM charges which are approximately \$2,500.00 per month.
- 3) Merchants dues will remain at \$150.00 per month.
- 4) Monthly payment on the Promissory Note dated October 12, 1987 shall be reduced from \$1,200.00 per month to \$580.00 per month, interest only.

This agreement will extend for the period of two years to March 31, 1990 at the end of which time the regular lease payments will resume and at this time also the full amount of the Promissory Note will be due and payable.

 7-13-88  
Richard Skankey / Date

 7/13/88  
Wesley Sine / Date

## Exhibit D

RECEIVED

JUN 27 1989

JOSEPH C. RUST (2835)  
SCOTT O. MERCER (3834)  
KESLER & RUST  
Attorneys for Plaintiff  
2000 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 355-9333

OFFICE OF JUDGE  
GLEN E. CLARK

UNITED STATES BANKRUPTCY COURT, DISTRICT OF UTAH,  
CENTRAL DIVISION

---

In re:	:	Bankruptcy No. 89C 03881
	:	(Chapter <u>11</u> )
WASATCH BOWLING, INC.,	:	
a Utah corporation,	:	
	:	
Debtor,	:	
	:	
Debtor's Tax Identification	:	ORDER
No. 87 0257646	:	
	:	
	:	
	:	
	:	

---

The motion of Olympus Hills Shopping Center, Limited ("Creditor") for relief from the automatic stay pursuant to 11 U.S.C. §362(f) came on for hearing before the above entitled court on June 27, 1989 at the hour of 3:45 p.m. Creditor was represented by and through its counsel, Scott O. Mercer of Kesler & Rust. Debtor appeared through Keith Henderson. Mr. Mercer discussed his efforts to notify counsel of the hearing as required by Rule 4001(a)(3) of the Bankruptcy Rules.

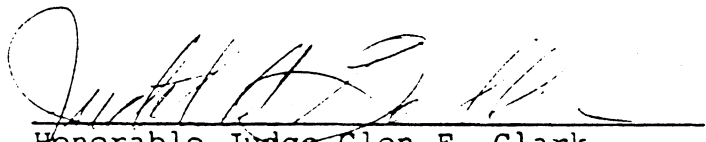
The court, having reviewed the verified motion for

relief from the automatic stay, and having found on the sole basis that Creditor will suffer irreparable and immediate injury, loss or damage if it is unable to complete the ordered eviction of debtor from the leased premises and proceed to place its new proposed tenant in possession forthwith; and the court having found that such damage is irreparable in that Creditor has been unable to find any other suitable tenant for this unique property; and the court having found that adequate effort was made to notify counsel for the debtor; it is hereby

ORDERED, ADJUDGED and DECREED that the automatic stay be and is hereby modified to allow Creditor to complete its state court action and executed writ of restitution restoring Creditor to possession of the leased premises located at 4015 South Wasatch Boulevard, Salt Lake City, Utah.

DATED this 28<sup>th</sup> day of June, 1989.

BY THE COURT:

  
Honorable Judge Glen E. Clark

I hereby certify that the annexed and foregoing is a true and correct copy of a document on file in the United States District Court for the District of Utah.

FILED June 28, 1989

ADMIN

Rette Davis

## Exhibit E

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

---

In re	)	Bankruptcy Case No. 89C-03881
	)	
WASATCH BOWLING, INC.,	)	
a Utah corporation,	)	
	)	
Debtor.	)	O R D E R

---

The matter presently and properly before the court is creditor Olympus Hills Shopping Center, Ltd.'s Motion to Require Debtor to Assume or Reject Lease, filed on July 6, 1989. The lease which is the subject of Olympus Hills' motion concerns premises known as the Wasatch Bowling Lanes, located at the Olympus Hills Shopping Center. A hearing was held on July 25, 1989. J. Keith Henderson appeared on behalf of Wasatch Bowling, Inc., the debtor in this Chapter 11 case. Scott O. Mercer appeared on behalf of Olympus Hills, the landlord. At the conclusion of the hearing, the court ordered counsel to brief within ten days the issue of whether the lease was in effect when the petition was filed in this case or had terminated prior to that time. Counsel have timely submitted memoranda on this issue, and the court has carefully considered and reviewed the arguments of counsel and all memoranda. The court has

also made an independent review of the pertinent authorities. Now being fully advised, the court finds and determines as follows:

1. Judge Scott Daniels' Order of June 15, 1989, restoring the debtor to possession of the premises, was without prejudice to the rights of Olympus Hills.

2. Prior to Judge Daniels' Order, Olympus Hills had evicted the debtor from the premises pursuant to the service of a writ of restitution.

3. But for Judge Daniels' Order, the debtor would not have been in possession of the premises on the date of petition and would have had no right to possession.

4. The prepetition eviction of the debtor pursuant to the writ of restitution terminated the lease, leaving nothing for the debtor to assume or assign on the petition date.

5. Even if the lease had not terminated, debtor's possessory interest under the lease had terminated. Thus, the only portions of the lease that the debtor had a right to assume or assign on the date of petition were the burdens, e.g., payment of the lease obligation.

6. It is unreasonable to allow the debtor to assume or assign the burdens of the lease without the corresponding benefit of possession. The lease is therefore deemed rejected.

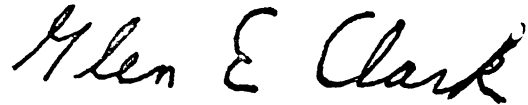
Accordingly,



IT IS HEREBY ORDERED that creditor Olympus Hills Shopping Center, Ltd., is granted relief from the stay to pursue its state-law remedies with respect to the premises known as the Wasatch Bowling Lanes.

DATED this 8 day of August, 1989.

BY THE COURT:

A handwritten signature in black ink, reading "Glen E. Clark". The signature is written in a cursive, flowing style. The first name "Glen" is written with a large, looped 'G'. The middle initial "E" is smaller and sits between the first and last names. The last name "Clark" is written with a large, looped 'C' and a trailing flourish.

---

GLEN E. CLARK, CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT

--oo00oo--

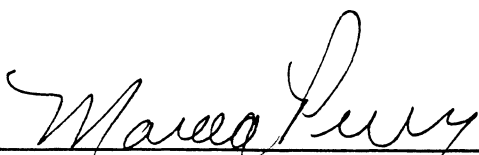
CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a copy of the foregoing Order to the following this 8 day of August, 1989.

Scott O. Mercer, Esq.  
KESLER & RUST  
2000 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

J. Keith Henderson, Esq.  
8 East Broadway, Suite 735  
Salt Lake City, Utah 84111

Lawrence E. Corbridge, Esq.  
CORBRIDGE, BAIRD & CHRISTENSEN  
215 South State Street, Suite 800  
Salt Lake City, Utah 84111

  
Secretary to Judge Clark

## Exhibit F

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

-----

IN RE

WASATCH BOWLING, INC.

)

)

)

)

ORDER OF DISMISSAL

Bankruptcy No. 89C-03881

-----

The above debtor(s) not having timely filed statement of affairs and schedules in the above case, it is now upon good cause, ORDERED, that the above case be and it is dismissed without prejudice.

DATED: August 16, 1989



United States Bankruptcy Judge

## Exhibit G

JOSEPH C. RUST (2835)  
SCOTT O. MERCER (3834)  
KESLER & RUST  
Attorneys for Plaintiff  
2000 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 355-9333

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

OLYMPUS HILLS SHOPPING CENTER, LIMITED, a Utah limited partnership,	:	
	:	AFFIDAVIT OF LAUREN B. HUNT
	:	
Plaintiff,	:	
v.	:	
	:	
WASATCH BOWLING, INC., a Utah corporation,	:	CIVIL NO. C87-8427
	:	Judge Homer F. Wilkinson
	:	
Defendant.	:	

---

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE )

Lauren B. Hunt, being first duly sworn, deposes and says:

1. I am the Property Manager of Coldwell Banker Real Estate Management Services.

2. I am over the age of 21 years and have personal knowledge of the matters set forth herein.

3. Coldwell Banker Real Estate Management Services is the property manager for Olympus Hills Shopping Center, Ltd. I am personally familiar with the lease agreement between plaintiff

and defendant in this action.

4. I am personally familiar with all of the payments made by defendant under the said lease agreement and am personally familiar with the business records relating thereto.

5. As of January 1, 1988, defendant was substantially past due in rental payments due under the lease agreement.

6. From January 1, 1988 to the present, defendant has never brought the rental payments current.

7. From January 1, 1988 to the present, no rental payment has been paid within ten (10) days of the due date.

8. Defendant is currently past due in rental payments in the amount of \$147,250.79.

DATED this 20th day of January, 1989.

  
Lauren B. Hunt

STATE OF UTAH                    )  
                                          : ss.  
COUNTY OF SALT LAKE    )

The foregoing instrument was acknowledged before me this 20th day of January, 1989 by Lauren B. Hunt, the Property

Manager for Coldwell Banker Real Estate Management Services.

SUBSCRIBED AND SWORN before me this 20<sup>th</sup> day of January,  
1989.

(Seal)

J. Deane Hark  
NOTARY PUBLIC  
Residing at Salt Lake City

My Commission Expires:

15 June 89

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed a true and  
correct copy of the foregoing Affidavit of Lauren B. Hunt in  
Civil No. C-87-8427, postage prepaid, this 20<sup>th</sup> day of January,  
1989, to:

Ronald C. Barker, Esq.  
2870 South State Street  
Salt Lake City, Utah 84115-3692

J. Deane Hark

l:afflauren.sine